BOOK REVIEW

REVIEW ESSAY: WHAT ARE THE PROSPECTS FOR SOCIAL CHANGE?

FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION. By Richard Delgado & Jean Stefancic.* Boulder, Co.: Westview Press, 1994. Pp. 207. $22.95.

*Reviewed by R. George Wright***

The post-World War II era has seen a number of movements for social change emphasizing reform of the law and of the legal system. Assessing the efficacy of such movements is now on the agenda, and a sense of their limited practical accomplishments obtains.[1] Accounting for that limited impact is the primary task undertaken by Richard Delgado and Jean Stefancic in *Failed Revolutions: Social Reform and the Limits of Legal Imagination.*[2] Their work is largely of a diagnostic or analytic character, with some measure of attention to ways of enhancing the prospects for genuine social change.

The authors' diagnoses are, generally, extraordinarily perceptive and astute. This is unsurprising in light of the authors' collectively prodigious contribution to the leading law reviews.[3] Their diagnoses lead the authors to what can be described as a generally pessimistic assessment of the prospects for significant social change. This Review documents the authors' pessimism at a general level and then briefly summarizes some of the ways in which the authors diagnose obstacles confronting meaningful social change in particular contexts. Some of the book's great value takes the form of a very large number of specific, concrete arguments and examples that, unsurprisingly, do not

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1. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 336-43 (1991). For a review of Rosenberg's book by Professor Delgado, see Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) (book review).

2. RICHARD DELGADO & JEAN STEFANCIC, FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION (1994).

3. For example, a casual check of the LegalTrac database from 1988 through the date of the book's publication reveals a total of at least 91 primary references to law review articles by, commentary on, or reviews of the works of Richard Delgado, including several joint works with Jean Stefancic.

lend themselves to compressed review. Overall, their diagnoses raise extremely important questions regarding the role of the concept of objectivity in the law and the role of normative or prescriptive thinking in promoting or resisting social change. This Review attends to such questions, concluding with a brief exposition of some reasons for a somewhat more optimistic assessment of the prospects for meaningful change, at least over the long term.

Delgado and Stefancic begin by observing that "earnest and well-meaning efforts to change things have a way of going for naught."[4] They report that

> [a]lthough we hold no great faith that as a society we will be able to surmount the barriers we identify, the reader will find a few positive suggestions scattered throughout the chapters and summarized in the concluding section. Ultimately, only a change in consciousness—in the way we look upon self, risk, and reform--can enable us to begin tackling the many problems that beset us. That change will entail abandoning the ingrained patterns and reactions that cause us to become mired in the first place. We are not optimistic that this will happen.[5]

Thus, while the authors' pessimism is perhaps not as stark as, for example, that of Derrick Bell,[6] it is nonetheless quite real.[7] Ultimately, with regard to their own suggestions, the authors conclude in this fashion: "Will these strategies enable us to accomplish much? We have our doubts."[8]

What, then, underlies the authors' pessimism? Generally, their analysis of resistance to social change emphasizes not so much our failures of will as the largely intractable failures of imagination, limitations of our capacity to empathize, and the largely unconscious workings and effects of powerful preconceptions, rationalizations, and general habits of mind conditioned by our historical and cultural situation.[9] The fear of significant change, reinforced by our disinclination to attend to any particular need for reform beyond an initial, transient burst of enthusiasm, lengthens the odds against meaningful, genuinely redressive social reform.[10]

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4. DELGADO & STEFANCIC, *supra* note 2, at xv.

5. *Id.* at xvii.

6. *Id.* at 9-10, 156 n.139 (citing DERRICK BELL, FACES AT THE BOTTOM OF THE WELL (1992); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992)).

7. *See id.* at 21.

8. *Id.* at 143.

9. *See, e.g., id.* at xvi.

10. *See id.* at xvi-xvii. It is tempting to think of this phenomenon as a reflection, in part, of a shortened cultural attention span and a reduced tolerance for frustration.

In the short space of a review, it is, of course, impossible to do justice to the authors' arguments with any level of detail. We can, however, at least sketch a few of their broad arguments in order to provide a sense of the direction of the book. Let us consider first the authors' discussion of the institution of freedom of speech.

The authors do not view our constitutional free speech rights as particularly effective in promoting substantial social change. They argue that "[o]ur vaunted system of free expression, with its marketplace of ideas, cannot correct serious systemic ills such as racism or sexism *simply because we do not see them as such at the time.*"[11] That we now view racially segregated public accommodations as racist and the denial of the franchise to women as sexist does not guarantee, or even significantly enhance the likelihood, that we will recognize and reject current forms of racism and sexism.[12]

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11. *Id.* at 4.

12. It is useful to pause at this early point to note the issues of the roles of objectivity and normativity. It is difficult to convey the authors' point without recourse to normative, at least objective-sounding, language. It is easy to begin by saying that slavery "really" or objectively was racist and is now recognized as such or merely that we now consensually view slavery as racist. It would also be easy to argue that our current view that slavery was racist does not guarantee that we will recognize objective or "real" contemporary racism as objective or "real" racism. If we try, however, consistently to substitute something like "what we deem or merely believe to be racist" for objective theories of racism, the results may be, at least linguistically, awkward. One might argue that the current consensus that slavery was racist does not guarantee that we will reach any, or much, consensus on our current practices. But this is clearly not what the authors wish to establish. Nor do they seek to suggest that our current beliefs about past forms of racism cannot guarantee that we will recognize any consensus on current forms of racism as a consensus. Our current consensus on past forms of racism might indeed promote some consensus on current forms of racism. But the authors surely must, at some point, appeal to something beyond mere consensus regarding either past or present practices.

In one of its senses, the idea of objectivity supplies what is missing. A consensus on racism may be objectively, or really, mistaken. An institution or practice may be objectively racist and, in principle, recognizable under appropriate conditions as racist, even if no relevant actor believes that institution or practice to be racist, objectively or otherwise. We argue below for the practical indispensability of the idea of objectivity in this sense.

In the meantime, we may set aside the fact that judgments of racism and sexism have both descriptive and prescriptive or evaluative elements as an interesting, but for our purposes inessential, complication. For one of many discussions of such mixed descriptive and evaluative judgments, see Heidi L. Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187 (1994). Professor Feldman contrasted objectivity with something like the merely personal, the failure to achieve a shared interpretive community in some respect. See *id.* at 1212-13; *see also, e.g.*, David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1, 10, 23-24, 32 (1992); Arthur Ripstein, *Questionable Objectivity*, 27 NOUS 355, 361 (1993). We need a somewhat more robust, group-transcendent idea of objectivity, however. For a sense of the varied possible understandings of the idea of moral objectivity, see, *e.g.*, KENT GREENAWALT, LAW AND OBJECTIVITY (1992); Jules Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1993) (endorsing "modest" objectivity); Russ Shafer-Landau, *Ethical Disagreement, Ethical Objectivism and Moral Indeterminacy*, 54 PHIL. & PHENOMENOLOGICAL RES. 331 (1994).

One interesting initial implication is that, despite the authors' own consistent employment of splendidly lucid prose, neither a "plain" style nor an abstruse, highly abstract, technically jargonized, esoteric prose style by advocates of social change is likely to change the world. Thus, current debates between those who contend that plain, conventional, readily graspable prose styles merely ratify the regnant categories and work against social change[13] and those who at least implicitly disagree may,[14] despite their intellectual interest, be largely inconsequential.[15]

The authors' critique of free speech does not operate solely at the level of consciousness. The authors specify, for example, that "the expense of speech . . . precludes the stigmatized from participating effectively in the marketplace of ideas."[16] This observation, however, highlights the availability of several distinct possible theses regarding a marketplace of ideas. Is the idea of a marketplace of ideas, generally or as bearing on serious systemic ills, itself incoherent or a mere arbitrary construct?[17] Or is the most important problem really one of achieving a genuine, maximally free market of ideas based on a far more nearly equal distribution of wealth and other resources relevant to participa-

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13. *See, e.g.*, FREDERIC JAMESON, MARXISM AND FORM: TWENTIETH CENTURY DIALECTICAL THEORIES OF LITERATURE 306-416 (1971).

14. *See, e.g.*, RAYMOND WILLIAMS, CULTURE AND SOCIETY 1780-1950 (1983).

15. On the merits of this debate, a nonjargonized style has much to recommend it. It is difficult to believe that the actual gains in insight or precision attainable through jargonized styles, over and above the best available nonjargonized "translations," outweigh the loss of accessibility and the sheer narrowing of the audience. Certainly, scientists such as Einstein, Bohr, Heisenberg, and Schrodinger did not attempt to do their primary works in language accessible to nonscientists. But their goal in such work was simply to "find out," to arrive at the best account of the experimental evidence, quite apart from the comprehensibility or persuasiveness of their works to nonscientists. Presumably, advocates for social change cannot generally be content with such a limited goal. When Einstein, Bohr, Heisenberg, and Schrodinger sought to reach broader audiences, they did not hesitate to adjust their methods of communication appropriately.

16. DELGADO & STEFANCIC, *supra* note 2, at 19.

17. *See, e.g.*, STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 102-19 (1994). Professor Fish argued that " 'free speech' is just the name we give to verbal behavior that serves the substantive agendas we want to advance." *Id.* at 102. Professor Fish argued that any regime of free expression is necessarily built upon or carved out of a broader set of logically possible speech, including a systematically, if only tacitly, negated set of allegedly meaningless or unjustifiable sorts of speech. *See id.* at 103; *see also* Stanley Fish, *Fraught with Death: Skepticism, Progressivism, and the First Amendment*, 64 COLO. L. REV. 1061 (1993). For reactions to Professor Fish's argument, see Frederick Schauer, *On Deriving Is-Not from Ought-Not*, 64 COLO. L. REV. 1087 (1993); Pierre Schlag, *How to Do Things with the First Amendment*, 64 COLO. L. REV. 1095 (1993). Ultimately, free speech probably becomes most coherent and meaningful to us only if we assume some sort of moral objectivity—where some ideas or practices can be genuinely better than others for reasons transcending some group perspective. Once we abandon the idea of such objectivity, the idea of free speech is, in many contexts, likely to seem incoherent, ultimately arbitrary, entirely group-based, or of merely propagandistic value.

tion in that market and then intelligently weighing speech against other basic values, including concerns for dignity and equal protection of the laws? If we assume that a freer market in ideas, based on a redistribution of resources relevant to speaking, is logically possible, is the problem then that such a redistribution of resources is, in practice, unlikely to occur?

Doubtless there are costs of various sorts associated with a free market, based on any distribution of resources. The idea itself seems to be imbued with competition, if not individualism. But much of what the authors say seems not to be directed at the somewhat metaphorical[18] idea of a market of ideas itself. The authors refer to the "supposed existence of a marketplace of ideas"[19] and to an "ostensibly free marketplace of ideas."[20] This language, along with the observation that the stigmatized, particularly the poor, are typically not in a position to compete effectively in the market of ideas due to lack of resources,[21] suggests that the authors' main concern is not with the most attractive market of ideas conceivable.

Much of what may be objectionable about the market of ideas may thus be a reflection of either market imperfections or the inequality of resources underlying familiar markets of ideas.[22] Of course, if the unequal distribution of relevant resources is thought to be inevitable,[23] the differences among these possible critiques may, in practice, be insignificant to the disadvantaged.

What happens when the speech of those with minimal resources manages to obtain a stall in the marketplace of ideas? The authors observe that "[s]tories that deviate too much from our own experience strike us as wrong, untrue, coercive, 'political,' "[24] and, therefore, undeserving of inclusion in the canon. Before a cogent counternarrative can be built, the ground must be prepared by showing—sometimes

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18. While "buying" an idea may have opportunity costs and may even raise the price of buying some other sorts of ideas, unlike most consumer purchases, "buying" a certain idea may leave one with no less, or even greater, resources with which to "buy" related ideas. Of course, buying an idea may be as much a matter of capital investment as of consumer purchase.

19. DELGADO & STEFANCIC, *supra* note 2, at 19.

20. *Id.*

21. *See supra* text accompanying note 16.

22. *See, e.g.*, Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 85.

23. *See id.* For a more optimistic view that draws upon the ideal speech situation theory of Jurgen Habermas, see, *e.g.*, Kai Nielsen, *State Authority and Legitimation*, *in* ON POLITICAL OBLIGATION (Paul Harris ed., 1989). For a sample of Habermas' relevant work, see, *e.g.*, Jurgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, *in* THE COMMUNICATIVE ETHICS CONTROVERSY 60 (Seyla Benhabib & Fred Dallmayr eds., 1990).

24. DELGADO & STEFANCIC, *supra* note 2, at 25.

through the judicious application of wit, irony, and satire—that our current institutions are not somehow necessary or inevitable and that such institutions often reflect particular dominant group interests at the expense of others.[25]

At least implicitly, judges, lawyers, and scholars choose sides in such matters. In such a context, we should bear in mind the case of, say, privileged judges who want conscientiously to decide between the competing narratives of the privileged and the nonprivileged in a genuinely nonarbitrary way. How they ought to do so is a matter we take up a bit further below, in the context of further discussion of the idea of objectivity.

Lawyers who seek to promote social change, the authors go on to note, face obstacles even in the form of the very tools of their trade. The schemes of classification or categorization of legal concepts, issues, and arguments will, even if well-intended, inevitably lag behind imaginative current thinking by activist lawyers.[26] Currently, the schemes tend to assume, for example, that discrimination against minority females can be thought of as involving, at the very most, a conjunction of discrimination on the bases of race and sex. This need not be so; discrimination against minority women may take on special features.[27]

Of course, as the authors recognize, computerized databases that permit relatively unconstrained, self-structured searches afford a partial, though hardly complete, resolution of such problems.[28] One intriguing implication is that even those who generally prefer a plain, accessible style of writing on social issues[29] should bear in mind the problem of computer retrievability of their work. It may be easier to search for standard jargon than for plainer language. Perhaps one ought generally to write plainly, but occasionally to incorporate, within some appropriate proximity, some of the most closely related standard jargon, for the sake of what might be called research accessibility.

Stepping outside the conventional, established legal categories in such a way as to transcend and transform those categories is neither common nor readily teachable.[30] One possible strategy is, again, to diversify and multiply the approaches that we legitimize and endow with resources. For every focused, highly organized, concentrated collective

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25. *Id.* at 40.

26. *Id.* at 46. Of course, if classifiers could concretely anticipate needs for future modifications of their classification systems, they would already have done much of the substantive theoretical work to be thus classified.

27. *Id.*

28. *Id.* at 47.

29. *See supra* note 15 and accompanying text.

30. *See* DELGADO & STEFANCIC, *supra* note 2, at 48.

effort that succeeds, there may be a number of serendipitous, unintended discoveries, made on a decentralized basis, by persons looking for something else. A key insight may be drawn from some apparently distant, minimally related discipline or subdiscipline.[31]

The authors trace the ways in which legal scholarship in the form of symposia and law review article citation patterns both promote and discourage social change.[32] Particularly valuable is the authors' attempt to support or undermine our common, merely intuitive impressions with more empirical, quantitatively oriented inquiry.

This is not to suggest that the authors are uncritical of mainstream empirical methodologies. Far from it. In the context of the harm to women from pornography, the authors make two especially interesting points, both tending to establish the limitations of mainstream social science research.

First, some harms can be genuine and important, but not, even in principle, subject to empirical investigation.[33] The law may or may not insist on some sort of overt, observable manifestation of injury, or at least some sort of pencil-and-paper documentation of injury. But some of the most serious injuries are what might be called "deontic" injuries[34]—injuries to the dignity or worth of the affected persons. Presumably, persons chronically subjected to deontic injuries may adapt in ways that reduce any associated psychological distress. But such adaptations may themselves involve a further injury, in the form of a suppression or deformation of personality. Deontic injuries may thus tend to seem ethereal and suspect to the empirically minded.

Second, empirical investigation of the linkage between pornography and harm to women will, in practice, tend to be unconsciously biased and methodologically crude.[35] Even if a harm is, in principle, subject to empirical investigation, there can be no guarantee that such a harm will, in fact, be investigated sensitively and well. Empirical social science, as currently practiced, has important limitations.

This is an important point in an era in which we are often respectful of or deferential to science in many contexts, without understanding the substance or methodologies and the methodological limitations of current social science. It is easy for us to assume that if a social or psychological phenomenon is not, by consensus, empirically demonstra-

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31. Hence, there is concern for academic research computerization's not indirectly discouraging "browsing."

32. *See* DELGADO & STEFANCIC, *supra* note 2, at 53-80.

33. *See id.* at 88.

34. *See* R. GEORGE WRIGHT, THE FUTURE OF FREE SPEECH LAW 58 (1990).

35. *See* DELGADO & STEFANCIC, *supra* note 2, at 87.

ble, we may assume its unimportance, if not its nonexistence.

But social science is not only immature, but inherently limited. To assume that empirical social scientists can and will set off an alarm in any case in which the basic interests of the disadvantaged are being injured—intentionally or unintentionally, by act or omission, gradually or subtly—is to overestimate the capacities of contemporary empirical social science. At the very least, we should supplement empirical studies with recourse to our collective, inarticulate "tacit knowledge,"[36] even though the latter is doubtless itself conditioned by the most familiar, dominant narratives.

This survey of Delgado and Stefancic's book does not, even by mere reference, exhaust the range over which the authors develop and concretely apply their basic theses.[37] But the questions of the roles of objectivity and normativity pervade the whole range. Let us consider what the authors have to say explicitly in this regard.

We have seen that the authors often employ language that is open to both morally or metaphysically objectivist and nonobjectivist construals.[38] But almost any language may be interpreted or intended in a nonobjectivist sense.[39] Complicating this issue is a distinct, but occasionally overlapping, sense of objectivity commonly referred to in contract and tort law contexts. Objectivity in these contexts refers to something like the meaning that a hypothetical reasonable member of the

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36. *See* Michael Polanyi, *The Logic of Tacit Inference*, *in* KNOWING AND BEING 138, 141 (M. Grene ed., 1969); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1331-32 (1984). For further suggestive discussion in the legal context, see, *e.g.*, Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 880 (1992); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 908-09 (1989) (discussing Fish, *supra*); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 853-54 (1988); Peter Tillers, *Mapping Inferential Domains*, 66 B.U. L. REV. 883, 936 (1986); David E. Van Zandt, *An Alternative Theory of Practical Reason in Judicial Decisions*, 65 TUL. L. REV. 775, 780 n.24 (1991); Nancy Levit, *Practically Unreasonable: A Critique of Practical Reason*, 85 NW. U.L. REV. 494, 499 (1991) (reviewing RICHARD A. POSNER, PROBLEMS OF JURISPRUDENCE (1990)).

37. *See also, e.g.*, DELGADO & STEFANCIC, *supra* note 2, at 95-103 (applying, in the context of Professor Joseph Sax's "public trust" approach to environmental regulation, the authors' view of the processes by which incrementalist approaches tend to drive out more genuinely broadly remedial approaches); *id.* at 115-41 (arguing, in the context of their theory of the uses of humor, for judicial suspicion of powerful actors and institutions and for respect and solicitude for the less powerful).

38. *See, e.g.*, *id.* at 23 (describing " 'serious moral error' " as "those shocking cases that virtually everyone later condemns"). For purposes of this Review, we use the term "moral objectivity" as a synonym for the more precisely accurate term "metaethical objectivity."

39. *See generally* ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT (1990); Simon Blackburn, *Errors and the Phenomenology of Value*, *in* MORALITY AND OBJECTIVITY 1 (Ted Honderich ed., 1985); Simon Blackburn, *Wise Feelings, Apt Readings*, 102 ETHICS 342 (1992).

community would infer, under the circumstances, from a speaker's words, as opposed to the merely idiosyncratic, though quite real, subjective intent or state of mind of the speaker.[40]

Thus the "objective" meaning of language in the contractual sense may be a merely hypothetical construct bearing no relation to the concededly quite real—and therefore metaphysically objective, but contractually "subjective"—actual state of mind or intention of the speaker. And the authors' quarrel is with the idea of objectivity, not in the metaphysical, but in the contractual sense. The authors observe that largely because the stronger party commonly has more influence over which interpretations are authoritatively taken to be reasonable or objective (in the contractual sense),[41] the stronger party in such contractual or tort disputes commonly prefers an allegedly reasonable or "objective" standard,[42] whereas the weaker party would prefer to be judged by her own actual "subjective" intent and experience.[43]

Thus, the interests of the more powerful actors, including males dating females, tend to be disproportionately reflected in what the law determines to be reasonable and, in a sense, "objective." But notice that this process does not, by itself, impeach the idea of objectivity in the metaphysical or moral sense. The "objective male" standard may be challenged by the very real—and, in the metaphysical sense, objective—experience and intent of the woman involved. And, as described by the authors, the "objective male" standard does not even consistently track its own logic.

Consider the authors' analysis of "objectivity" in the context of date rape: "Notice what the objective standard renders irrelevant: a downcast look (which the man interprets as modesty or delicate anticipation); ambivalence; the question, 'Do you really think we should?'; slowness in following the man's lead; a reputation for sexual selectivity; virginity; youth; and innocence (the greatest prize of all!)."[44] All of these elements are objective rather than subjective, in the sense that they represent overt behavior or are otherwise determinable by outsiders without reference to the intentions or state of mind of the woman. Of course, the "objective standard" may try to avoid the implications of these objective considerations by interpreting them as indicating, or at least as consistent with, consent. But there are limits to the ways in which these objective factors can be excluded or reinterpreted in accor-

40. *See, e.g.*, E. ALLAN FARNSWORTH, CONTRACTS § 7.9, at 503-04 (2d ed. 1990).
41. *See* DELGADO & STEFANCIC, *supra* note 2, at 108.
42. *See id.* at 107.
43. *See id.* at 110.
44. *Id.* at 109.

dance with any plausible objective standard. For example, "virginity; youth; and innocence" generally cannot be plausibly interpreted as specially indicative of consent or a disposition to consent. What would their opposites then indicate?

It is admittedly possible, in practice, for the man to argue that virginity, youth, and innocence, as well as their very opposites, tend generally to indicate consent. This may even be argued commonly. But that does not make the argument plausible, or even coherent. As a last ditch maneuver, it is possible for the man completely to reinterpret the idea of consent, such that being involuntarily in either of two jointly logically exhaustive categories, such as young and not young, indicates consent. But such a revision is obviously far more implausible than even the most extreme inferences drawn by John Locke;[45] and reducing consent to the status of being female empties consent of all of its traditional moral content, force, and appeal.

Thus, an objective standard of consent, suitably interpreted, can offer women at least minimally greater protection than they currently enjoy. As the authors recognize,[46] in other contexts, an objective standard would evidently serve the interests of the disadvantaged better than would a subjective standard.[47] The real problem, as the authors suggest, "touches on issues of world-making and the social construction of reality."[48] Specifically, the more powerful actors tend to universalize their own limited experiences, interests, and perspectives and to impose them on others under the rubric of objectivity or reasonableness itself.[49]

None of this impeaches the idea of metaphysical or moral objectivity. If what is generally deemed to be objectively reasonable tends simply to reflect the interests of the powerful, this process can be exposed. If the powerful are consciously or unconsciously anointing their own ex-

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45. *See* JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT § 119 (Prometheus Books ed. 1986); *see also* Charles R. Beitz, *Tacit Consent and Property Rights*, 8 POL. THEORY 487, 488 (1980) (stating that "traveling on a highway and being within the territories of a government simply are not forms of consent, nor do they imply a willingness to give consent should an appropriate occasion arise"); A. John Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791, 819 (1984).

46. *See* DELGADO & STEFANCIC, *supra* note 2, at 108.

47. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239-42 (1976) (imposing a requirement of showing intent to discriminate). For commentary, see, *e.g.*, Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 50-52 & n.287 (1977); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339-44 (1987); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Reappraisal*, 79 COLUM. L. REV. 1023, 1040-41 (1979). In a different context, see R. George Wright, *Hazardous Waste Disposal and the Problems of Stigmatic and Racial Injury*, 23 ARIZ. ST. L.J. 777, 792-99 (1991).

48. *See* DELGADO & STEFANCIC, *supra* note 2, at 108.

49. *See id.* at 108.

perience as "objective," this can be debunked. To legitimize only the experience of the powerful is not only contrary to the interests of others, it is also untrue to the pretensions, or the underlying logic, of objectivity in the metaphysical or moral sense. Ultimately, we will need the idea of metaphysical objectivity. Without it, we are reduced to a mere clash of interests, perceptions, and slogans between the powerful and the less powerful, with no way reasonably to adjudicate between them. It is not difficult to predict the long-term outcome of such a conflict, even if many among the powerful choose, on some ultimately arbitrary ground, to identify with the less powerful.

Now, most of the process of exposing the illogic and the self-contradictoriness of universally imposing the perspective of the more powerful can be carried out at the level of observation, analysis, and description, whatever our motives for undertaking this project in the first place. Once all the pretense has been exposed, and all the illusions have been stripped away, however, a further step must be taken. Once the conflicting interests have been revealed to the bright sunlight, we must make a normative or prescriptive choice.[50] We cannot simply read off our morally most justifiable allegiances from the descriptive evidence.[51]

Of course, this is not to suggest that all normative or prescriptive analysis must aim at objectivity in the moral or metaphysical sense. Clearly, it need not.[52] Nor is it to suggest that explicitly normative prose is generally more effective than more purely descriptive or predictive prose in motivating or otherwise promoting social change. We may reasonably imagine that an autobiographical description of life under apartheid typically would be no less persuasive than some detached, abstract, explicitly normative broadside against apartheid. Claims of historical inevitability doubtless galvanized Marxist loyalties. It seems plain as well that normative analysis is constantly used, in any number of ways, to retard or reduce social change.[53] As the

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50. The authors assume a distinction between normative or prescriptive statements, on the one hand, and observational or descriptive statements, on the other. While any such distinction is controversial, it is harmless in the context of the authors' work and this Review.

51. *See* DAVID HUME, A TREATISE OF HUMAN NATURE 469 (L.A. Selby-Bigge ed., 1968).

52. *See, e.g.*, sources cited *supra* note 39.

53. *See, e.g.*, Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933 (1991) [hereinafter Delgado, *Norms*]; *see also* Richard Delgado, *Moves*, 139 U. PA. L. REV. 1071 (1991). For variant approaches, see, *e.g.*, Margaret J. Radin & Frank Michelman, *Pragmatists and Poststructural Critical Legal Practice*, 139 U. PA. L. REV. 1019 (1991); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Mark Tushnet, *The Left Critique of Normativity: A Comment*, 90 MICH. L. REV. 2325 (1992).

authors point out, normative analysis typically discourages, and then at a later stage promotes, modest or incremental social change at the expense of more far-reaching reforms.[54]

The authors observe in this connection that "[n]ormative analysis . . . serves as a kind of social homeostat, ensuring that change occurs at just the right pace—not too early, not too fast, and not too far."[55] Worse, we often suppose that "for every reformer's plea, an equally plausible argument can be found against it."[56] But then, as the authors argue, we cannot expect much real progress to be caused by switching from normative to descriptive narratives.[57]

Of course, the authors do not claim that normative analysis can, or normatively should, be entirely abandoned.[58] But their awareness of the limits and the constraining effects of normative discourse cannot help but inform the authors' overall pessimism. Are there any reasonable grounds, though, for any greater degree of optimism? Must progressive thought see itself as painfully slowly progressive thought? Let us briefly consider possible grounds for optimism.

The authors began by positing that "[u]ltimately, only a change in consciousness—in the way we look upon self, risk, and reform—can enable us to begin tackling the many problems that beset us."[59] This may well be right. But to hold power is, among other things, to hold the capacity to inhibit or interestedly to steer changes in the way that we look upon ourselves. Can there be any escape from the exercise of power?

A possible answer is, at least in rare instances, yes. It is possible that the powerful may broadly employ to their advantage, promote, and fully legitimize some important institution long before realizing that the development of that very institution may eventually tend to undermine the ideological position of the powerful at a time when that institution is no longer fully subject to the control of the powerful.

Are there any current candidates for not fully controllable, potentially subversive institutions? We have mentioned that, however dimly understood, natural science is at least prestigious. And it is only the very depth and pervasiveness of science in contemporary culture, like the air around us, that may lead us to underplay its power and

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54. *See* DELGADO & STEFANCIC, *supra* note 2, at 101.

55. *Id.*

56. Delgado, *Norms*, *supra* note 53, at 960. Relatedly, in the present volume, the authors point out that "all discourse marginalizes," thus implicitly re-raising the overarching problem of choice. DELGADO & STEFANCIC, *supra* note 2, at 65.

57. *See generally* DELGADO & STEFANCIC, *supra* note 2, at 23-40.

58. *See* Delgado, *Norms*, *supra* note 53, at 936.

59. DELGADO & STEFANCIC, *supra* note 2, at xvii.

influence.

Now, this is not to say that science influences the rest of culture more than the rest of culture influences science or that science does not have very distinct material prerequisites. But science is culturally powerful and, given its accumulated momentum, after a time not fully steerable, even by the powerful. Of course, science often underpins the powerful and the ethos of the powerful. Scholastic metaphysics made the idea of rigid social hierarchies seem natural and inevitable.[60] Social contract theory depends upon the plausibility of an underlying methodological individualism.[61] The carefully structured checks and balances of the United States Constitution in some measure reflect indirectly the ideas of inertia, momentum, and the laws of motion devised by Sir Isaac Newton.[62] It is difficult to escape the common basic intuition that some sort of linkage or analogy obtains or should obtain between the order of being, on the one hand, and the way that we ought to order our social affairs, on the other.[63] Nor have contemporary legal thinkers been oblivious to such a linkage possibility.[64]

These linkages may, however, be either benign or malevolent. If we think that all mental activity can be modeled by a theory of computer programming, we may essentially have to ditch traditional notions of free will, responsibility, and any meaningful idea of human dignity.[65] If we think that quantum theory implies inherent, inescapable indeterminacy or that the world is simply a product of our observations, other sorts of admittedly loose social inferences may be drawn.[66] If we think that Einstein teaches that no framework or perspective is privileged, we likely will ultimately react in a manner that is socially consistent

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60. *See, e.g.*, NICK HERBERT, QUANTUM REALITY: BEYOND THE NEW PHYSICS xi (1985); *see also* Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 59 FORDHAM L. REV. 263, 264 (1989).

61. *See generally* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962).

62. *See* Laurence Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 3 & n.5 (1989); John Veilleux, Note, *The Scientific Model in Law*, 75 GEO. L.J. 1967, 1987 n.96 (1987).

63. *See, e.g.*, PETER FORREST, QUANTUM METAPHYSICS xiii (1988).

64. *See, e.g.*, Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1401 (1986) (describing particular developments in science as supporting feminist theory).

65. *See, e.g.*, ROGER PENROSE, THE EMPEROR'S NEW MIND: CONCERNING COMPUTERS, MINDS, AND THE LAWS OF PHYSICS 3-29 (1989); ROGER PENROSE, SHADOWS OF THE MIND: A SEARCH FOR THE MISSING SCIENCE OF CONSCIOUSNESS (1994).

66. *See, e.g.*, Elise Porter, Note, *The Player and the Dice: Physics and Critical Legal Theory*, 52 OHIO ST. L.J. 1571 (1991); *see also* Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987).

with that understanding.[67] If we come to conclude that life and decision-making are mostly about natural selection, our ethics may tend to be brought into line.[68]

But are there any trends in current scientific thinking with the potential, as the authors say, to alter our consciousness, our sense of self, in a way broadly conducive to genuine social change across the range of issues commonly of concern to social activists? There may be. Certain strands of current natural science may be providing real or metaphorical support—and even metaphorical support may suffice—for a fundamental revision of the most destructive forms of individualism.

Now, it must be admitted that at least the excesses of individualism have long been deplored in philosophy, sociology, anthropology, theology, and literature. Counternarratives are not historically unknown.[69] But consider, in contrast, the general prestige, power, and authority of contemporary natural scientists when they are describing what they have found.[70] It may be that most societies, ancient and modern, have had at least some vague inkling that individualism is, at least in some respects, not only less than admirable, but somehow false. It is only in contemporary science, however, that we find experimentally based, observational data to support such counternarratives.

What has been called the idea of "relational holism,"[71] or inherent relatedness, has been developed by scientific theorists and experimenters in a number of ways, none of which presently need to be discussed. Suffice it to say that, increasingly, scientists discussing events at the atomic scale and beyond[72] are driven to the language of inseparability. The quantum physicist Henry Stapp, for example, has spoken of scientific "recognition of a profound wholeness in nature, of a fundamental inseparability and entanglement of those aspects of nature that have

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67. *See, e.g.*, Porter, *supra* note 66, at 1585; Williams, *supra* note 66, at 441.

68. *See, e.g.*, HERBERT SPENCER, THE MAN VERSUS THE STATE (Caxton Printers ed. 1965). More benevolently, note the evolutionary influences in the early chapters of GIBBARD, *supra* note 39.

69. For citations to the works of John Donne, Walt Whitman, Thomas Merton, and Natan Sharansky, see R. George Wright, *Should the Law Reflect the World?: Lessons for Legal Theory from Quantum Mechanics*, 18 FLA. ST. L. REV. 855, 865 nn.52-55 (1991). An award for arguable prescience goes to Walt Whitman, *Song of Myself*, *in* COMPLETE POETRY AND SELECTED PROSE 25 (James Miller ed., 1959) ("every atom belonging to me as good belongs to you").

70. Admittedly, we do not all stop reading horoscopes, smoking cigarettes, or ingesting unhealthful amounts of saturated fats. Such cases may be distinguishable, aberrations, or otherwise explainable.

71. *See, e.g.*, Paul Teller, *Relational Holism and Quantum Mechanics*, 37 BRIT. J. PHIL. SCI. 71, 73 (1986).

72. *See, e.g.*, HENRY P. STAPP, MIND, MATTER, AND QUANTUM MECHANICS 4-5 (1993).

formerly been conceived to be separate."[73] Professor Stapp's view is well-grounded in the earlier works of the developers of quantum mechanics[74] and is currently amply supported.[75]

Such views plainly have already diffused into other academic disciplines and the popular literature.[76] Of course, the underlying mathematical logic of such views is not now, and quite possibly never will, be, popularly grasped. But the underlying mathematical logic of, say, Newton's laws of motion did not need to be popularly understood in order for the Newtonian model to be socially and politically influential.

Now, even in an age of instantaneous global communication, it is implausible that any reflection of this underlying intrinsic relationalism or inseparability will be broadly politically or legally influential over the short-term future.[77] So, if the authors' pessimism is based on a concern that there is little realistic ground for hope over the short term, the logic of intrinsic inseparability may offer no basis for optimism. But the authors' pessimism may also be founded, in part, on the concern that fundamental revision of human consciousness and, in particular, of the sense of self is unlikely on any relevant timescale. And, here, in light of current developments referred to above, there seem to be grounds for greater optimism. Change, when it comes, may ultimately be quite substantial.

Why, in the meantime, has social change in the United States oc-

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73. *Id.* at 213. Professor Stapp has gone on to explain that "[t]he apparent separateness of ordinary physical objects turns out, in this view of nature, to be a statistical effect that emerges from the multiple actions of many quantum events." *Id.* Professor Stapp, incidentally, also asserted that "the idea that man is not responsible for his acts has no longer any basis in science." *Id.*

74. *See, e.g.*, DAVID BOHM, WHOLENESS AND THE IMPLICATE ORDER 134 (1983); ALASTAIR RAE, QUANTUM PHYSICS: ILLUSION OR REALITY 51 (1986) (discussing the interpretation of Niels Bohr).

75. *See, e.g.*, Richard Healey, *Holism and Nonseparability*, 88 J. PHIL. 393 (1991); Richard Healey, *Nonseparable Processes and Causal Explanation*, 25 STUD. HIST. & PHIL. SCI. 337 (1994); Don Howard, *Holism, Separability, and the Metaphysical Implications of the Bell Experiments*, *in* PHILOSOPHICAL CONSEQUENCES OF QUANTUM THEORY: REFLECTIONS ON BELL'S THEOREM 224 (James Cushing & Ernan McMullin eds., 1989) [hereinafter PHILOSOPHICAL CONSEQUENCES]; Abner Shimony, *Search for a Worldview Which Can Accommodate Our Knowledge of Microphysics*, *in* PHILOSOPHICAL CONSEQUENCES, *supra*, at 25, *reprinted in* ABNER SHIMONY, 1 SEARCH FOR A NATURALISTIC WORLDVIEW 62 (1993); John Jarrett, *Bell's Theorem: A Guide to the Implications*, *in* PHILOSOPHICAL CONSEQUENCES, *supra*, at 60. For Bell's work, see JOHN S. BELL, SPEAKABLE AND UNSPEAKABLE IN QUANTUM MECHANICS (1987). *See also* Gerhard C. Hegerfeldt, *Causality Problems for Fermi's Two-Atom System*, 72 PHYSICAL REV. LETTERS 596, 599 (1994) (discussing, as one of several possible ways to account for certain results, the view that "[s]ystems localized in disjoint regions might not exist as a matter of principle, so that strictly speaking they always 'overlap' ").

76. *See, e.g.*, sources cited *supra* notes 71-75.

77. We may say this despite the ground's having been prepared by analogous themes in social science and nonscientific disciplines for centuries in many cultures.

curred at the pace that it has? The authors present and discuss a number of explanations, as we have seen. By way of conclusion, we may add minimally to their account from a somewhat different angle. Perhaps some weight can be attached to the fact that the post-World War II United States has gradually moved from a position of international market dominance to a position of mere anxious competitiveness, to one degree or another, in such markets. Such a transition may conceivably affect the redistributive magnanimity of the well-to-do. This would suggest that social change might be more rapid in countries that grew relatively more rapidly than the United States after World War II, but this effect may be masked by any remaining overall wealth differentials between the United States and those countries. Now, in some sense, the United States as a whole has been, by historical standards, enormously rich over the relevant period. But material wealth has generally not increased the subjective satisfaction of the well-to-do.[78]

In fact, even as real income in the United States rose in the postwar period, subjective satisfaction or reported happiness may have declined, at least for substantial periods of time.[79] In this general period, the percentage of persons describing themselves as "very happy" has declined, and most significantly, this decline is most clearly marked among the economically well-to-do.[80]

Now, one might argue that if the well-to-do become less satisfied, they will become more, not less, disposed to social change. Perhaps, in some respects, this may be true. But it is not easy to see why a well-to-do group sensing stagnation or, even, a slow erosion of any bases for their subjective satisfaction would be inclined to speed up the rate of genuinely redistributive transfers of power and opportunity in favor of the less well-to-do. In recent years, crucial numbers of middle- and working-class Americans have become increasingly concerned that their access to secure, stable, perhaps lifetime jobs with adequate wages and benefits is in jeopardy. Addressing this concern may well be a prerequisite to much progressive social change.

Additionally, it should be remembered that movements for social change do not march along a flat surface. The marching may at some points be uphill, even sharply uphill, rather than flat. Consider, for example, the changes in terrain in the continuing battle against racism.

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78. *See* GEORGE KATONA, PSYCHOLOGICAL ECONOMICS 363 (1975).

79. *See* RONALD INGLEHART, THE SILENT REVOLUTION 116 (1977); Alan T. Durning, *Are We Happy Yet? How the Pursuit of Happiness Is Failing*, 27 FUTURIST 20, 21 (1993).

80. See Angus Campbell, *Subjective Measures of Well-Being*, 31 AM. PSYCHOLOGIST 117, 118 (1976).

Do not the real costs to the well-to-do of current reforms tend to rise over time? How significant to the well-to-do is the desegregation of public schools to which, with some likelihood, they contribute limited tax dollars and in which they do not enroll their children? How significant to the well-to-do is the desegregation of neighborhoods in which they do not live? Of course, this is not to suggest that even such early-stage reform movements as these have been successful.

The point is that these relatively early-stage continuing battles are unlikely to affect the interests of the more powerful groups as significantly or as directly as chronologically later movements, such as affirmative action or reparations. The march is, it would seem, up an increasingly steep hill, against presumably increasing resistance by the well-to-do.[81] It would not be surprising to find an analogous situation in the context of other social movements. Overcoming such resistance may indeed be a matter of changing consciousness and the sense of self, a transformative process to which we may look, as we have seen, with different degrees of optimism and pessimism.

81. Offsetting this phenomenon, at least to some degree, may be a sense of recent precedents' being set, or of a cultural momentum favoring reform. As the authors note, however, such momentum tends to dissipate. *See* DELGADO & STEFANCIC, *supra* note 2, at xvii.